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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~[illegible]~~ 450

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

against

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT AS TO JURISDICTION

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Opinions Below

The Supreme Court of Arkansas wrote an opinion which together with the dissenting opinion is appended hereto as Appendix A, and which are reported in 393 South Western Reporter, 2d 219. The trial court did not write an opinion.

Jurisdiction

(i) This case arises from a decree entered in the Jefferson County, Chancery Court, First Division of Arkansas, which found certain issues of the above-named magazines to be obscene, enjoined their distribution, decreed their destruction, directed the appellants to surrender all other copies of the issues for destruction, and retained jurisdiction to determine whether any future issues are obscene and whether or not they come within the terms of the decree and that any future issues will be enjoined upon a showing that the magazines are obscene, and to make such orders as may be necessary concerning the future sale of the above mentioned magazines.

(ii) The judgment of modification and affirmance was made and entered by the Supreme Court of Arkansas on May 24, 1965, Appendix B, *post,* 37. Timely petitions for a rehearing were filed in the Supreme Court of Arkansas on June 7, 1965, Appendices C, F, *post,* 39, 44. They were entertained and considered on the merits by that court, Appendices E, H, *post,* 43, 48. Their timeliness is certified by the court, Appendices E, H. The applications for a rehearing were denied by orders each dated and entered on September 20, 1965, Appendices D, G, *post,* 42, 47.

The Notice of Appeal was filed on December 10, 1965 in the Supreme Court of Arkansas, the court possessed of the record.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507; *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U. S. 282; *Jacobellis* v. *State of Ohio,* 378 U. S. 184; *Department of Banking* v. *Pink,* 317 U. S. 264, 266; *Bowman* v. *Loperena,* 311 U. S. 262, 266.

Statutes Involved

The statute involved is Act No. 261 of the Laws of 1961, Ann. Stat. 41-2713-41-2728, which reads as follows:

"41-2713. Arkansas law on obscenity—Title.—This Act [§§ 41-2713—41-2728] shall be known as the Arkansas Law on Obscenity and may be referred to by that designation. [Acts 1961, No. 261, § 1, p. 935.]

41-2714. Purpose and intent.—The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State. [Acts 1961, No. 261, § 2, p. 935.]

41-2715. Definitions.—The following words, terms and phrases used in this Act [§§ 41-2713—41-2728] shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) 'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(4) 'Printed or written matter or material' means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution. [Acts 1961, No. 261, § 3, p. 935.]

41-2716. Possession, sale or distribution of obscene material unlawful—Penalty.—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give [gives] away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act [§§ 41-2713—41-2728], or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or materials, other than mailable mat-

ter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one [1] year, or both. [Acts 1961, No. 261, § 4, p. 935.]

41-2717. Action to determine obscenity of mailable matter.—Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter. [Acts 1961, No. 261, § 5, p. 935.]

41-2718. Complaint—Filing—Contents.—The action authorized in Section 5 [§ 41-2717] shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction. [Acts 1961, No. 261, § 6, p. 935.]

41-2719. Order to show cause—Service.—Upon the filing of the complaint described in Section 6 [§ 41-2718], the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [probable] cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probably [probable] cause to believe such mailable matter to be obscene, it shall issue an order to show cuase [cause] why the same shall not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of

a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section. [Acts 1961, No. 261, § 7, p. 935.]

41-2720. Answer, trial date.—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respondents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined. [Acts 1961, No. 261, § 8, p. 935.]

41-2721. Trial procedure.—The public interest requires that all actions prescribed in this Act [§§ 41-

2713—41-2728], other than criminal actions under Section 4 [§ 41-2716], be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions. [Acts 1961, No. 261, § 9, p. 935.]

41-2722. Judgment—Enforcement.—In the event the Courts [Court] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of such respondent wherever the same may be found. [Acts 1961, No. 261, § 10, p. 935.]

41-2723. Injunctions—Contents of order granting—Effect.—Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active consert or participation by

contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons, and in the same manner, as is provided in Section 7 [§ 41-2719] of this Act. [Acts 1961, No. 261, § 11, p. 935.]

41-2724. Mailable matter subject to provisions of act.—Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4 [§ 41-2716]. [Acts 1961, No. 261, § 12, p. 935.]

41-2725. Contempt.—Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 [§ 41-2723] and who shall disobey any of the provisions thereof shall be guilty of contempt of court. [Acts 1961, No. 261, § 13, p. 935.]

41-2726. Extradition.—In all cases in which a court has entered its judgment, pursuant to Section 10 [§ 41-2722], that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person

shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this state. [Acts 1961, No. 261, § 14, p. 935.]

41-2727. Possession creates a presumption.—The possession of any three (3) of the things enumerated in Section 4 [§ 41-2716] of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. [Acts 1961, No. 261, § 15, p. 935.]

41-2728. Non-resident—Consent to jurisdiction—Procedure.—In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5 [§ 41-2717]. [Acts 1961, No. 261, § 16, p. 935.]''

Questions Presented

1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

3. Was the statute in question applied unconstitutionally in violation of the First and Fourteenth Amendments by providing a restraint upon the publication and distribution of future issues of the magazines?

4. Was the Fourteenth Amendment violated by the failure and refusal of the Supreme Court of Arkansas to refuse to accept evidence of community standards?

5. Was the Fourteenth Amendment violated by the refusal of the Supreme Court of Arkansas to apply a national standard in adjudicating said publications as obscene?

6. Was Act 261 of The Arkansas Acts of 1961 unconstitutionally applied in this case in reaching the conclusion that the publications are obscene?

7. Are the publications in question obscene within the construction of the Fourteenth Amendment?

8. Was the Fourteenth Amendment violated by the appellee's failure to prove by scientific and competent evidence that the publications appeal to prurient interests as construed?

9. Was the Fourteenth Amendment violated by the failure of the Supreme Court of Arkansas to consider each magazine as a whole in determining that they are obscene?

10. Were the First and Fourteenth Amendments violated by the direction in the decree for the destruction of all copies of the issue of the magazine complained against

possessed by appellants, whether such possession was in Jefferson County, Arkansas or in some other states of the United States?

11. Were the First and Fourteenth Amendments violated by the provisions of the decree restraining the possession of future issues of the magazines involved?

Statement

The Attorney General of Arkansas commenced this action in the Jefferson County, Chancery Court, First Division, under Act 261 of 1961 of the laws of Arkansas against appellants, who are non-residents of Arkansas to have certain issues of the magazines in the caption of this action be declared obscene, enjoining their distribution and that the copies in the custody of the appellants be surrendered and destroyed (Ab. 6)*. The statute provides (Section VI) for the complaint to be directed against the magazine by name as well as the publisher or distributor, thus accounting for the names in the caption. The particular issues of the magazines involved are set forth in the Amendment to Complaint (Ab. 13).

The appellants answered, denied the obscenity of the issues of the magazine, and challenged the constitutionality of the statute on its face and as to its applicability (Ab. 9, 10, 15 and 16; S. A. 9).

The cause came on for trial before the court and an advisory jury. The jury held all the magazines to be obscene (Ab. 17). Thereupon a decree was entered against the appellants holding the magazines to be obscene, enjoining

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* Wherever "Ab." is used, it refers to pages of the record on appeal filed as "Abstract and Brief for Appellants" by all appellants other than Gent and Par Publications, Inc. The abbreviation "S.A." refers to "Supplemental Abstract and Brief" filed by appellants Gent and Par Publications, Inc.

their distribution in Jefferson County, directing the destruction of the magazines within ten days and retaining jurisdiction to restrain future issues of the magazines and to make any orders concerning future issues of the magazines (Ab. 17-21). The trial court refused to permit Gent to file an answer, and judgment went against it by default.*

The appellants appealed to the Supreme Court of Arkansas which by a vote of 5-2, modified the decree to the extent of permitting Gent and its publisher to be a party to the appeal, but affirmed as to all the substantive questions raised (Ab. 22, Appendices A, B). The appellants made timely applications for a rehearing, but which were denied on the merits (Appendices C, D, E, F, G, H).

Stage and Manner of Raising Federal Questions

The questions here presented were raised in the Supreme Court (Ab. 190, 160, 183, 187, 189; S. A. 6 and 12), in which appellants Gent and Par Publications, Inc. adopted and designated the record on appeal of the other appellants, 30-62; Opinions, Appendix A. Petitions for Rehearing, Appendices C, F (*post*, 39, 44),

The Supreme Court passed upon the questions, Opinions, Appendix A.

The questions were also raised at the trial by the pleadings, Ab. 9-11; by objections during the trial, Ab. 43, 48-50, 150, 152-153; by exceptions to the court's charge to the jury, Ab. 139, 140, 145, 146, 147, 148, 149, 150.

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* The Supreme Court held, however, that the Chancellor was in error and granted that magazine permission to argue in the appeal on the merits (Opinion, Appendix A).

The Questions Are Substantial

It should be noted that the judgment of the Supreme Court of Arkansas was decided by a vote of 5-2. Both the majority and minority wrote with an expectation that this court should ultimately decide this case. The majority observed (*post,* 33):

> "We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let here be said that, if a firm and clear guideline had been established, we should certainly follow it, for we recognize that the rulings of The United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But as previously pointed out, we find no definite determination by a court majority that a 'national standard shall apply'."

And in a prelude to these thoughts, that court said (*post,* 23):

> "In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion."

The dissenters said (*post,* 36):

> "In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases (citing cases).
>
> • • •

> In my opinion the decision in this case will be reversed by the U. S. Supreme Court. I, therefore respectfully dissent.
>
> I am authorized to say that Mr. Justice George Rose Smith joins in this dissent."

It will be noticed that the statute is most unusual in many parts, the pertinent ones being as follows:

1. The statute is mainly directed against out-of-state, non-resident publishers.

2. In its proscriptions against non-resident publishers the statute seeks to control the interstate movement of publications.

3. The orders and decrees provided by the statute reach into the home operations of the non-resident publisher.

Since this case is the first one under the statute, there are no constructions of it other than those found in this case.

The Supreme Court of Arkansas with respect to the attacks on the validity of the statutes said:

> "We do not agree with appellants that Section 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law."

A. The first attack upon the validity of the statute is that it seeks to draw within the ambit of the courts of Arkansas jurisdiction over non-resident publishers whose works are sent into Arkansas. In this, the statute is not limited to control over the purveyors of the publications

in Arkansas. It stretches out its arms to reach persons who have no business in the State other than that books and magazines are shipped there (Section 41-2714 and 2728). The exercise of such jurisdiction may result in a determination in that State that the magazines are obscene, by a national standard (although the magazines may pass approval in the state of publication or authorship or the federal mails, Section 2724) and the publisher directed (Section 2722 Sub. b, c) and as was done in this case to yield up all copies in possession of the appellants (Ab. 19, 21). In other words, under this statute and the decree in this case the courts are empowered to control the business operation and existence of publishers outside the state (2717). See also Section 2719 providing for service by mail of the order to show cause at the place of publication, and Section 2728 providing that by the very transmission of the publications into Arkansas the publisher submits himself to the jurisdiction of the state.

Taking the last, first, the statute in subjecting to the jurisdiction of such persons to the courts violates the First and Fourteenth Amendments in placing an onerous burden on the dissemination of literature. In requiring a non-resident publisher to submit to the control of the state into which publications may be sent, merely because they are sent there, interferes with the free flow of the literature.

Moreover, the provision of the statute authorizing a decree that would reach beyond state lines and compel a non-resident publisher to surrender under penalty of contempt (2725) and extradition (2726) all condemned copies owned by non-resident publishers is an intrusion into the field of publication that the Fourteenth Amendment condemns.

In this connection, it should also be noted that the non-resident publisher who ships "obscene" material shall be guilty of a felony, punishable by imprisonment not less

than one and up to five years and a fine of $2,000. The effect of such a statute is that if the laws of every one of the 49 states, other than the one of the publisher, had such a law, the non-resident publisher could be found guilty in each state for a felony (49 felonies in all on the shipping of a single issue of a single magazine), 49 times five years imprisonment = 245 years, and 49 times $2,000 in fines = $98,000. All of this because of the interstate shipment of a single issue of the literature in this case.

The appellants are publishers. All the publications enjoy second class mail privileges (Ab. 1, 8), and have nation-wide distribution (Ab. 1). The appellants are non-residents and were served by process by mail, pursuant to court order (Ab. 8, 9).

B. Closely associated with the foregoing vice of the statute is the unconstitutional application of the statute that resulted in an invasion of the freedom of publication. The decree directed that all copies of the issued proscribed shall be destroyed by appellants within ten days (Ab. 19). This had the effect of ordering these non-resident publishers, whose supply of the issues are not within Arkansas, to destroy them, even if their possession is lawful within the state of their residence. Failure of the appellants to comply would result in contempt (2725) and extradition (2726).

C. The statute was unconstitutionally applied. The publications in question are not obscene by any standard, whether national or local. They are the same type of publications, the "girlie" type, that passed muster by the Court of Appeals of New York in *People* v. *Richmond County News Inc.*, 9 N. Y. 2d 578, and which case was noted with approval in *Jacobellis* v. *Ohio*, 378 U. S. 184. Indeed, it was the *Gent* magazine, one of the magazines here, whose April 1957 issue was involved in the *Richmond County News* case, 9 N. Y. 2d 578 at 580. Certainly, these publications would meet the tests that were adequate in *Trailins*

v. *Gerstein*, 378 U. S. 576; *Grove Press* v. *Gerstein*, 378 U. S. 577; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372; *One, Inc.* v. *Oelsen*, 355 U. S. 371; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *Jacobellis* v. *Ohio*, 378 U. S. 184.

D. The statute was unconstitutionally applied in that the courts below (Ab. 139-141) refused to apply a national standard in determining whether the publications are obscene. The Supreme Court held that this court in *Jacobellis* did not hold that a *national* standard must be used. Consequently, that court refused to apply it, and said in its opinion that this court has created a confusion that it could not follow. This, without more, is reason enough to give substance and novelty to this appeal.

E. The statute was applied in violation of the Federal Constitution by the failure of the State to produce evidence of a scientific nature to demonstrate that the publications create pruriency. The burden is on the State to justify its restraint upon publications. *Freedman* v. *Maryland*, 380 U. S. 51. Consequently, the censor should produce the evidence which he claims supports his conclusion of appeal to pruriency. No such evidence was produced to support the conclusion reached by the court below that the magazines appeal to pruriency.

F. The trial court refused to accept evidence of community standards (Ab. 153, 43, 48-50; 101-103). This was affirmed by the Supreme Court. This court pronounced in *Smith* v. *California*, 361 U. S. 147 and in the *Jacobellis* case to the contrary that the accused in such a case may establish community standards. The appellants in making the offer to prove community standards proved to be generous. The burden of establishing community standards is on the one seeking to inhibit expression. The State failed to prove community standards.

G. Another novel and significant issue is presented by this appeal. In applying the *Roth* test that the publication must be judged *as a whole,* does the "whole" in a magazine mean the entire issue or only a whole story among several, in the magazine. The trial court held that the rule applied only to each separate article as a whole (Ab. 150, 146). We submit that this novel question must be resolved in favor of the appellant. What is at issue in the case is not the obscenity of any particular article or story in a magazine. It is the effect of the issue of the magazine that is sought to be condemned. Therefore, it is wrong to judge each article separately. The court in doing so, unconstitutionally applied the statute.

H. The trial court rendered its decree which still stands unchanged as to its substance. It provides that the court retains jurisdiction to determine whether future issues are obscene and whether they come within the terms of the order. This injunction against future issues of the same magazine is a plain violation of the rule in *Near* v. *Minnesota,* 283 U. S. 697 and *Kingsley Books* v. *Brown,* 354 U. S. 437, 441. The Attorney General and the Supreme Court realized the chancellor was wrong and sought to palliate it by an interpretation that would render the offending decretal words as surplusage. Of course, the chancellor was not a party to the fiction, for his words in the record demonstrate that he intended what he said—to enjoin all future issues. The following colloquy ensued (Ab. 152):

> "Mr. Dunaway (Appellant's then counsel): Did I understand the court correctly to say that the sale of these magazines is permanently restrained and the injunction *will not be* confined to the issues of the magazines which are in the suit? (Emphasis supplied.)
>
> The Court: That's right.
>
> * * * * * *

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients."

The decree is still unmodified in that respect and operates as a restraint. The Supreme Court did not strike that portion of the decree and it remains in force.

Conclusion

It has been shown that several novel questions of substance are found in this case which should be reviewed by this court. The most significant ones are: (1) The restraint exercised by the State of Arkansas on out-of-state publishers and compelling them to submit to its jurisdiction and to its control of the publishers' business; (2) These "girlie" publications, distributed nation-wide, with second class mailing privileges were held to be obscene by the unconstitutional application of the statute; (3) Are the community standards to be applied in judging the publication the standards of a village, county, state or nation; (4) Are magazines to be judged as a whole or article by article.

Any one of these novel issues is substantial to warrant the noting of probable jurisdiction. Collectively, they are even more compelling for review by this court.

Respectively submitted,

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APPENDIX A

Opinion.

HARRIS, Chief Justice.

[1] This appeal is from a decree of the Jefferson Chancery Court, holding that certain magazines were obscene. The court enjoined the appellants from sending, bringing, or causing to be brought, into Jefferson County for sale, exhibit, or gift, any of these magazines, and ordered them destroyed. Jurisdiction was retained to determine whether any future issues are obscene, and appellants were "notified that any future distribution of obscene publications, as set out, and found above, to be obscence, will also be restrained and enjoined and magazines will be removed." Included in the injunction were W. E. Burnham, Jr., county distributor of the magazines, and John Nickell, operator of a newsstand, which sold the magazines. The particular publications held to be obscene were Swank, Gent, Modern Man, Bachelor, Cavalcade, Gentlemen, Act, and Sir.[1]

The case arose upon complaint of the Prosecuting Attorney that the magazines were obscene, and in violation of Act 261 of the General Assembly of 1961 (Ark. Stat. Ann. § 41-2713-2728 [Repl. 1964]). The Chancellor impaneled, on motion of the state, an advisory jury, which, at the conclusion of an extended trial, unanimously found all magazines listed to be obscene. The court also found the magazines to be obscene, and issued its injunction. From the decree so entered, appellants bring this appeal.

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[1] Actually, this court would be justified in dismissing the appeals because of non-compliance with Rule 9. We recognize that the contents of the magazines could not be fully abstracted, but we know of no reason why copies of each magazine offered in evidence could not have been furnished for each judge to examine. The inconvenience occasioned by seven different judges examining the one copy of each magazine is obvious. However, because of the importance of, and interest in, the case, we have separately inspected the exhibits in order to reach a determination on the merits of the litigation.

[2] One preliminary matter needs to be disposed of. The court refused to permit Gent to file an answer, holding that the answer had not been tendered in time, and the judgment, as to this publication, was taken by default. We think the court erred. General counsel for the publication of Gent, in New York, wired the court on March 11, 1964, asking for a continuance, for the purpose of obtaining suitable counsel. The Chancellor replied by letter, acknowledging the telegram, and stating, "The cause was continued yesterday to be heard April 28, at 9:30 AM." Local counsel was subsequently retained, and tendered a response on April 24. We think the Chancellor's reply, which neither denied the request, nor indicated that the court had no authority to grant same, could well have been taken by New York counsel to mean that Gent had until April 28 to file an answer. Accordingly, appellant's request that it be made a party to this appeal, and that its argument on the merits of the appeal be considered by this court, is granted.

For reversal, seven alleged errors are asserted; however, some of these errors relate to the selection of, and instructions given to, the jury. Error is also asserted because of the court's refusal to admit into evidence other magazines and articles, as a matter of comparison, and the refusal to permit counsel to inquire from the state's witnesses whether they considered these other publications obscene. However, during oral argument before this court, counsel for all appellants requested that we make a determination on the merits, i.e., that we decide whether the magazines are obscene, rather than remand the case because of error committed during the trial. We therefore, do not consider the alleged errors heretofore mentioned. Suffice it to say that we agree that procedural error was committed, but in compliance with appellants' request, we disregard legal mistakes committed in selecting and instructing the jury,

and proceed to a discussion of the principal issue.[2] In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of the law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion.

In 1957, the United States Supreme Court decided the case of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498. After holding that obscenity is not within the area of constitutionally protected speech or press, the court stated:

> "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*[3] The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

Following this decision, a number of states, through their legislatures, adopted the italicized standard. In 1961, the

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[2] A jury in Chancery Court acts in an advisory capacity only, the court not bing bound by jury findings. In this case, both the jury and the Chancellor reached the same conclusion.

[3] Emphasis supplied.

Arkansas General Assembly passed Act 261, which defines the word, "obscene," in the exact language set forth in the Roth case.

Appellants, for reversal, rely upon the more recent case of Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793, and assert that this case makes clear that the "contemporary community standards," mentioned in Roth, actually refers to a "national" community, rather than a "local" community. Appellants vigorously argue that Jacobellis determined conclusively that the "national community standard" must be applied. We cannot accept this contention, since it does not appear that five judges, constituting a majority of the court, agreed upon the "national community" standard. The case was decided by a six to three vote, in which the lower court was reversed. There was no court opinion. Mr. Justice Brennan announced the decision, and wrote an opinion. Mr. Justice Goldberg concurred in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Douglas, Black, and Stewart concurred in the judgment of reversal, the first two on the basis that the Constitution does not permit censorship at all, and Mr. Justice Stewart, in a separate opinion, stating that the constitution only permits censorship of "hard core pornography;" further, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Mr. Justice White concurred in the judgment for reversal, without expressing a reason. The Chief Justice, joined by Justice Clark, in a dissenting opinion, rejected the national standard, which Justices Brennan and Goldberg stated the court must apply. Mr. Justice Harlan likewise dissented saying:

> "• • • The more I see of these obscenity cases the more convinced I become that in permitting the States

wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws * * * and protection of genuine rights of free expression. * * *"

Thus, it appears that only two justices of the prevailing six adopted the national community standard. It is therefore evident that a majority of the court, whatever may be the thinking, have not flatly said that the national standard must be applied. Much has been written about the Jacobellis case, and we think one of the most comprehensive articles (or notes) appears in 40 Notre Dame Law., P. 1 (Dec. 1964).[4] The article states:

"According to the opinion of Mr. Justice Brennan in Jacobellis v. Ohio, the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country—all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion."

After pointing out that, though critical, the writers intend nothing derogatory toward the court or its individual members, it is further stated:

"Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelopes the problem of obscenity as a result of the opinions in some recent

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[4] The note was prepared by Joseph O'Meara, Dean of the Notre Dame Law School, and Thomas L. Shaffer, Assistant Professor of Law of the Notre Dame Law School.

Supreme Court cases and the entire absence of opinion in others."

The article then notes that Justice Brennan sets out in his opinion that the Supreme Court must ultimately decide when a particular work is obscene, and the article poses the question of the logic of the court itself deciding obscenity cases when it does not decide for itself matters of equal or greater importance; for instance, whether a convicted murderer, when firing a fatal shot, was capable of distinguishing right from wrong, or was under a compulsion so strong that he was without power to resist it. These matters, of course, are determined by a jury. It is the opinion of the writers of the article that the Supreme Court, in deciding that it is the duty of the court to make its own independent decision of the issues in obscenity cases, has committed itself to an impossible task.

"Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

"As a matter of *fact* there is no national community standard. Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well. • • •

"• • • And to go back to population, the standard varies from one large city to another. Thus, it appears that practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

"Further examples of the *fact* that standards vary from one community to another come readily to mind.

Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? * * *

"Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say, Washington, D. C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

"Even as regards the big cities, there is no 'community standard.' There are many and conflicting standards; and our legal institutions provide judges no mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard. But that is historically the role and function of the jury. The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple.'"[8]

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[8] 13 Kan. L. Rev., P. 117 (1964), also contains an interesting article entitled "Obscenity: The Search for a Standard."

Appendix A.

Summarizing the views expressed in the several Jacobellis opinions, it is obvious that the court, in the final analysis, determines obscenity cases *de novo,* but the standard applied is not so readily apparent.

The stories and pictures in the eight magazines in question, in the main, deal with the theme of sex. The pictures generally portray side or back views of young females, totally unclad, or front views of the girls, unclad from the waist up. A large number of the stories, or articles, deal with adultery or fornication, the number varying in the several magazines.[6] In fact, all can be classified under the general term, "girlie" magazines. A few examples of the type of stories, or articles, found will illustrate the general theme. For instance, the following is an excerpt from a story in Ace, entitled "On the Level."

> "The window was open.
>
> "I tugged at the shade and it snapped up with a swich, and there I was gazing at the two most perfect breasts in creation. Full they were, and round and firm, and by any criterion, utterly fantastic. She was powdering them with a fluffy pink puff, and as the shade flew up she paused in mid-puff. • • •
>
> "She was lovely, but there was something wrong in the way she looked, in the tilt of her head, in the raven shimmer of her lustrous black hair, in the feline greenness of her eyes. And then I knew what it was—she was on her feet.

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[6] No effort is made in appellants' briefs to point out differences in the articles, or pictures, from the different magazines, i.e., one magazine might possibly contain obscene material, but another particular magazine does not. It is simply the contention of appellants that none of the magazines can be classified as obscene, under the law as declared by the United States Supreme Court; a separate argument is presented by Gent, which is represented by different attorneys.

Appendix A.

"Just as Goya's nudes would look ludicrous standing up, and Botticelli's undraped beauties would look foolish except lying down, so this chick was made for the horizontal; and while she was standing upright, I knew that on her back she'd be sensational. • • •

"We reacted to one another as if we were oppositely magnetized. My mouth was on her lips—moist, full, red lips. I've a thing for lower lips. The chick can be a dog as long as the lower lip is a full, soft one.

"She intertwined herself about me, nudely white from cascading raven hair to scarlet toenails, and the sensation was not of this world. I could feel the sleek perfection of her body through my clothes, her ruby-tipped breasts pushing against me impatiently. I felt her soft arms around me, under my arm-pits, as she hooked her exquisitely manicured hands at my shoulders, thrusting her dancer's belly toward me.

"And I suddenly realized that we were standing by the open window. Not only could we be seen in sharp relief against the white apartment walls by everyone in neighboring apartments, but my colleague, a fellow student, might come looking for me any moment. I pried loose, and the chick let go with low moans that set my hair climbing. I'd been right. She was the type that digs. What might have been foolish prematurity had turned out to be telling perception. She was a chick who thought 'horizontally.' • • •

"• • • What it was with her, I couldn't quite pin down, but she never made love in the dark, and always with the blinds up—and once while there was a girl friend in the living-room. It got to be a bit embarrassing. But she was a cool sketch, and she knew how to use that horizontal body of hers—*so well.* I didn't really give a damn."

Appendix A.

In Bachelor, a particularly obnoxious (to us) article appears, entitled "Those Free-Loving Coeds—Why Every Man Should Go To College." The opening paragraphs of this article (giving some idea of the nature of the remainder of the story) are as follows:

> "If you're a young man with plenty of initiative; zip and get-up-and-go, the place to be right now is in college. Just think of all the advantages. I don't mean the ordinary ones of being exposed to the great minds of science and the arts, learning from brilliant instructors and preparing yourself for a career. The advantages I'm talking about are even more important and have to do with meeting the most willing group of coeds ever to invade the campus scene.
>
> "The fact is, today's crop of college girls are not only loving more—but they are more lovable, too. And it all goes to give Joe College fonder memories of his Alma Mater to take with him when he graduates.
>
> "Only recently, for example, an anonymous senior from a large coed university in the middle-West was asked by an interviewer why his school had so few panty-raids in comparison with some of the all-male Eastern schools.
>
> "The senior grinned. 'Why *should* we have panty raids, here?' he asked. 'They are all right for guys who can't get enough of the real thing. The girls in this school, though, keep us perfectly happy and content'."

Again, in Ace, the story, "39 inches of Femme Fatale," commences as follows:

> "'You are a bitch!' Louise said.
>
> "'Yes, aren't I?' Carla Sanders laughed indulgently. 'And right here is 39 uptilted inches of bitchi-

ness that I intend to make pay off.' Insultingly she cupped her hands under her breasts."

From Cavalcade, "The Wrong Chimney":

"'Shh,' she murmered.

"She lifted his hand to cup her full breast, and turned a bit, her eyes closed, lifting her face to kiss him on the mouth, her rich lips parted. His hand felt her warm softness and moved of itself, amorously, his other hand automatically reached behind her, caressing, his mouth felt her warm lips and the tip of a tongue going into his, darting, exploring.

"She drew her face back a little, breathing fast, her eyes still closed. He looked at the lovely features he'd dreamed of so often looking just this way, with the same eager, surrendering expression, and reached for her again.

"'You were late,' she said softly. 'I was afraid . . . Don. . . .'

"She stopped talking as her mouth again met his. Then it penetrated . . . Don, she'd said. He started to draw back but he couldn't, he wanted her too much. He raised his hand a little to the back of her proud lovely neck and kept her mouth pressed to him. Then he thought . . . polite . . . proper . . . courteous . . . an officer and a gentleman, and pulled his seeking lips from her eager mouth.

"'Hurry,' she said, her eyes still closed, 'We only have a few minutes'."

We recognize that articles, or stories (and pictures), dealing with sex are not necessarily obscene. The material only becomes obscene when it deals with sex in a manner appealing to prurient interest. Of course, there

are frequently pictures or drawings in health and art magazines, which might be said to deal with sex, but such magazines would not be considered obscene, because their *dominant theme* relates to health or art. In Lockhart and McClure, "Censorship of Obscenity," 45 Minn. L. Rev. 5, Page 91, we find:

> "In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene. * * *"[7]

There are articles, or stories, in these eight magazines, which would not be considered obscene, but, in viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest.

[3] Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards

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[7] It is mentioned also that some pornographers "may seek to disguise the pornographic nature of the dominant theme of the materials they assemble, by the inclusion of some material that is clearly legitimate."

of Washington, New York, Chicago, or San Francisco,[8] nor is there any way for us to know the "standard" of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas.[9]

We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it, for we recognize that the rulings of the United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But, as previously pointed out, we find no definite determination by a court majority that a "national standard" shall apply.

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[8] The press carried an account, datelined San Francisco, May 9 of this year, as follows: "Bosoms were bared again Saturday as bawdy North Beach celebrated the acquittal of its topless dancers and fashion models.

"Two separate juries brought in the innocent verdicts Friday, vindicating nightclub owners and their busty showgirls of police charges of lewd conduct."

It is interesting to note that the trial judge, in directing the jury to return a verdict of not guilty, stated: "No police officer can substitute his personal feelings of what is right or wrong.

"The test is not what a couple of people feel. The test is what the people of San Francisco feel."

This occurrence points up the difference in the standards over the nation, for women appearing in this state in similar "attire" (or lack of it) would be in violation of the criminal statutes.

[9] The State's witnesses were Reverend J. W. Watson, Pastor of Lakeside Methodist Church in Pine Bluff, Carl Welch, a business leader of the city, B. E. Whitmore, County School superintendent of Schools, Reverend Pirtle, Pastor of Second Baptist Church of Pine Bluff, Arthur C. Hendrix, Assistant Probation Officer of Jefferson County, and Norman Young, Chief of Police of the City of Pine Bluff.

[4, 5] Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of a publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazines will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered. Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree.

[6] We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law.

The decree is modified to the extent that appellant Gent is made a party to this appeal, and, with such modification, said decree is affirmed.

JOHNSON, J., concurs.

GEORGE ROSE SMITH and ROBINSON, JJ., dissent.

Appendix A.

Dissenting Opinion.

ROBINSON, Justice.

Not only is it the duty of the United States Supreme Court to uphold the Constitution, but it is the duty of this court, and every court in the land, to support and defend the Constitution. Of course, any document as important as the Constitution has to be construed. It would be utterly impossible to write a Constitution for a great nation that would need no construction by courts of competent jurisdiction, and no one now questions the jurisdiction of the U. S. Supreme Court to construe the Constitution.

The First Amendment, as construed by the U. S. Supreme Court, among other things, protects the freedom of speech and freedom of the press. The Supreme Court has construed this Amendment many times but the majority of our court, in the case at bar, has cited only two cases on that point; neither of the cited cases sustain the majority opinion, and no other authority is cited sustaining the majority view. One of the cases cited by the majority is Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. The facts in the Roth case are not shown, therefore it is not known whether it is analogous with the case at bar.

The other case is Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793. There, Jacobellis was convicted in the Ohio courts on two counts of possessing and exhibiting an alleged obscene film in violation of Ohio Statutes. The picture was a French film called "Les Amants" ("The Lovers"). The conviction was reversed by the U. S. Supreme Court. Here, the majority makes no attempt to point out any distinction between the Jacobellis case and the case at bar. Otherwise, the majority has not shown how it can be said that the material in the case at bar is obscene and therefore not protected by the First

Amendment, notwithstanding what the U. S. Supreme Court has said in the Jacobellis case.

In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases, including Times Films Corp. v. City of Chicago et al., 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72; One, Inc. v. Olesen, Postmaster of Los Angeles, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352; Sunshine Book Co. v. Summerfield, Postmaster General, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352; Kingsley International Pictures Corp. v. Regents of University of State of New York, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512; Manual Enterprises, Inc. v. Day, Postmaster General, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639.

All of the foregoing cases are directly in point with the case at bar. There was a conviction in each case of violating some statute prohibiting dissemination of obscene material. In each case the alleged obscenity involved was lewed, lascivious, and perhaps shocking. In each case the conviction was reversed by the Supreme Court of the United States.

The majority has made no attempt whatever to distinguish the alleged obscene material in the case at bar from the material that was in issue in the foregoing cases. There is no effort to show that the material involved here is any more obscene than the material that the Supreme Court has held to be protected by the First Amendment.

In my opinion the decision in this case will be reversed by the U. S. Supreme Court. I, therefore, respectfully dissent.

I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

APPENDIX B

Law or Chancery Mandate

State of Arkansas,
In the Supreme Court } SCT.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 24th day of May, A. D. 1965, a day of said term

Gent, et al.
Appellant

No. 5-3529
vs.

The State of Arkansas
Appellee

Appeal from
Jefferson Chancery Court
First Division District.

This cause came on to be heard upon the transcript of the record of the chancery court of Jefferson County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that the decree of said chancery court in this cause should be modified to the extent that appellant Gent is made a party to this appeal, and that as so modified the decree should be affirmed.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause be modified as above set out, and as so modified, in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof.

GEORGE ROSE SMITH and ROBINSON, JJ., dissent; JOHNSON, J., concurs.

IN TESTIMONY, That the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, PHILIP N. GOWEN, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of November, A. D. 1965.

PHILIP N. GOWEN,
Clerk.

By JIMMY H. HAWKINS,
D.C.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. 3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE, and SIR MAGAZINES,

Appellants,

v.

STATE OF ARKANSAS,

Appellee.

APPEAL FROM THE
JEFFERSON COUNTY CHANCERY COURT

Filed
June 7, 1965
PHILIP N. GOWEN
Clerk

PETITION FOR REHEARING

Petitioners, *Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir* magazines and their publishers, move that the Court grant a rehearing in captioned cause for the following reasons:

1. The Court erroneously based its determination of obscenity on local community standards instead of on the standards of the national community.

2. The Court used standards of obscenity not constitutionally permissible, thus denying petitioners their rights

of free speech and freedom of the press and depriving them of their property without due process of law, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

3. The Court denied petitioners procedural due process in violation of the Fourteenth Amendment to the United States Constitution in refusing to consider offered evidence bearing on the establishment of community standards and in considering the testimony of witnesses on this question, when petitioners had been denied the right of proper cross-examination of these witnesses, in the Court's *de novo* determination that the magazines in suit are obscene.

4. The injunction as issued by the trial court and approved by this Court constitutes in effect a prior restraint on publication in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

5. The opinion of the Court leaves the erroneous impression that petitioners agreed that the Court should not consider procedural errors, when at all times, including in the oral argument, petitioners were urging that the Court consider these questions.

WHEREFORE, petitioners pray that they be granted a rehearing or, in the alternative, that the opinion be modified to state accurately that the Court refused to pass on the procedural errors, but not that this was done at the request of petitioners.

ROBERT C. DOWNIE,
Robert C. Downie,
EDWIN E. DUNAWAY,
Solicitors for Appellants.

Appendix C.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. A copy has been served upon opposing counsel by mailing same on June 8, 1965.

EDWIN E. DUNAWAY.
Edwin E. Dunaway.

APPENDIX D

STATE OF ARKANSAS,
In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 20th day of September, A. D. 1965, a day of said term

GENT, ET AL.
Appellant

No. 5-3529

Appeal from Jefferson Chancery Court District

VS.

THE STATE OF ARKANSAS
Appellee

5-3529. Gent et al. v. State of Ark.

Petition for rehearing was denied in the above styled case.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Philip N. Gowen, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of November, A. D. 1965.

PHILIP N. GOWEN,
Clerk.

By JIMMY H. HAWKINS,
D. C.

APPENDIX E

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition for rehearing in the case of Gent et al v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 7th day of December, 1965.

Philip N. Gowen, Clerk

By OLIVER E. COX, D.C.
Oliver E. Cox

(SEAL)

APPENDIX F

IN THE SUPREME COURT OF ARKANSAS

GENT, ET AL — APPELLANTS

vs. — No. 3529

STATE OF ARKANSAS — APPELLEE

PETITION OF GENT MAGAZINE FOR REHEARING AND BRIEF

Appellant, Gent Magazine—Par Publications, Inc., respectfully petitions the Supreme Court of Arkansas for rehearing upon its decision in this case in the Opinion delivered herein on May 24, 1965, upon the following grounds:

1. The Court erroneously held that the U. S. Supreme Court did not apply a national community standard in the Jacobellis v. Ohio case. The U. S. Supreme Court decision reversed the Ohio courts which had applied a *local* community standard finding the material obscene. The United States Supreme Court held that it was not obscene and the concurring opinions cannot be construed as approving a local community standard.

2. The Court rejected a national community standard but did not establish what the local community standard for Pine Bluff was under the evidence in the case and applied an unconstitutional one.

(a) Although the Opinion referred to witnesses that testified, examination of their testimony shows that virtually all of their testimony related *only* to the effect on "young people". See R. 38, 39, 40, 42, 54, 68, 74, 76, 77, 78, 85. Applying the test of the effect on young people, does not comply with the holding in the Roth case or with the requirement of the Arkansas Statute that the effect be measured by the *average person* and not just young people.

(b) The Court did not decide the question as to the admission of evidence tendered by the Appellants in the Trial Court of Pine Bluff community standards. This evidence is described at pages 37 and 38 of Gent's brief and R. 153 through 159. This evidence should have been admitted and its effect on the community standard considered with the other evidence in the Record.

(c) The Court should have taken into account the effect of the Trial Court's erroneous limitation of defense's cross examination of witnesses to test the community standard by the witnesses against other materials available in the community (See R. 44, 45, 48, 49, 50 and 51). Since such cross examination was not permitted in the Trial Court, the Arkansas Supreme Court should evaluate the State's witnesses' testimony in the light of the other materials tendered by the defense or disregard their testimony.

3. The Court's Opinion misleadingly states that the Appellant requested that legal mistakes in the Trial Court be disregarded. The Appellant, Gent Magazine, was agreeable to have the case decided on the merits rather than remanded but not that the errors be disregarded. Failure to consider the errors resulted in a denial of due process of law.

4. Footnote 6 of the Opinion states that no effort was made to point out the differences in the various magazines. Gent Magazine argued separately from the other magazines that its contents where not obscene either by the dominant theme of the material or individual articles and discussed them in detail (See Gent's brief, pp. 34-37). We submit that Gent Magazine should be separately evaluated.

WHEREFORE, the Appellant, Gent Magazine—Par Publications, Inc., pray for rehearing of this cause and that the

Court separately evaluate this Appellant's magazine on its own merits, and to find that said issue of the Appellant's magazine is not obscene and reverse and dismiss the case.

GREGORY & CLAYCOMB,

By H. Murray Claycomb.

CERTIFICATE

Attorneys for Appellant Gent Magazine—Par Publications, Inc., Petitioner for rehearing, certify that they believe there is merit in the foregoing Petition for Rehearing and in the argument thereon, presented herewith, and said Petition is not filed for the purpose of delay.

GREGORY & CLAYCOMB,

By H. Murray Claycomb,
Attorneys for Gent Magazine.

APPENDIX G

Law or Chancery Mandate

State of Arkansas
In the Supreme Court } SCT:

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 4th day, being the first Monday of October, A.D. 1964, amongst others were the following proceedings, to wit:

On the 20th day of September, A.D. 1965, a day of said term

Gent, et al. — Appellant
No. 5-3529
vs.
The State of Arkansas — Appellee

Appeal from Jefferson Chancery Court District

Petition for rehearing was denied today in the following case.

3529. Gent v. State of Ark.

In Testimony, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Philip N. Gowen, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 6th day of December, A.D. 1965.

Philip N. Gowen, Clerk

By Jimmy H. Hawkins D.C.

APPENDIX H

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, PHILIP N. GOWEN, Clerk for the Supreme Court of Arkansas, certify that the petition of the appellants, Gent and Par Publications, Inc., for rehearing in the case of Gent, et al. v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 13th day of December, 1965.

PHILIP N. GOWEN,
Philip N. Gowen,
Clerk.